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Dismantling the Dismantling of Federal Protection for Arctic Waterways: Revisiting Canada's New *Navigation Protection Act*

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Abstract

This article calls for legislation with the necessary flexible mechanisms to protect the changing Arctic environment. Drastic changes in the Arctic are caused by from climate change,¹³⁰ with adverse effects on Arctic waterways.¹³¹ Yet in 2012 Canada's Conservative federal government passed legislation that removed the bulk of Canadian, including Arctic, waterways from federal protection. This article critiques the new legislation and suggests ways through which the Canadian federal government might revise it and develop related legislation that would enhance, rather than diminish, protection for the Arctic.

1. Introduction: Climate Change in the Arctic

Climate change in the Arctic is occurring at an alarming rate, creating an unstable and unpredictable geophysical environment; this includes Arctic waterways.¹³² Inuit in Labrador and Nunavik (Northern Quebec) report rising temperatures, stronger tides, earlier springs, and changes in animals, including sickness in caribou and the arrival of new species such as moose.¹³³ Thus, these and related factors affect Inuit food security and other aspects of

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¹³⁰ E. Post, Eric, Mads C. Forchhammer, M. Sydonia Bret-Harte, T. V. Callaghan, T.R. Christensen, B. Elberling, A.D. Fox et al, "Ecological dynamics across the Arctic associated with recent climate change," *Science* 325, no. 5946 (2009): 1355-1358.; L.D. Hinzman, N.D. Bettez, W.R. Bolton, F.S. Chapin, M.B. Dyurgerov, C.L. Fastie, B. Griffith et al, "Evidence and implications of recent climate change in northern Alaska and other arctic regions," *Climatic Change* 72, no. 3 (2005): 251-298.

¹³¹ O.M. Johannessen, E.V. Shalina and M.W. Miles, "Satellite Evidence for an Arctic Sea Ice Cover in Transformation," *Science* 286 (1999), 1937-39; D.A. Rothrock, Y. Yu, and G.A. Maykut, "Thinning of the Arctic Sea-Ice Cover," *Geophysical Research Letters* 26/23 (December 1999), 3469-3472.

¹³² E. Post et al, *op. cit.*; L.D. Hinzman et al, *op. cit.*; O.M. Johannessen et al, *op. cit.*; D.A. Rothrock et al, *op. cit.*

¹³³ C.M. Furgal, D. Martin and P. Gosselin, "Climate Change and Health in Nunavik and Labrador: Lessons from Inuit Knowledge," In *The Earth is Faster Now: Indigenous Observations of Arctic Environmental Change*, I. Krupnik and D. Jolly, eds., Arctic Research Consortium of the United States in cooperation with the Arctic Studies Center, Smithsonian Institution, 2002, 267-300.

health.¹³⁴ The mental health of Circumpolar people is affected directly by climate change and/or indirectly through stressors like media reports or government policy¹³⁵; the extreme changes to Canada's Navigable Waters Act is one instance of this.

2. Federal environmental protection in Canada

In Canada, Arctic and other waterways had been protected under the Navigable Waters Protection Act, passed in 1985. Because of this act, in order for a project to proceed, its proponents had to submit their plans to a federal review process which used hearings and studies to carry out cost-benefit analysis and impact assessment, which were publicly reported on. Potential projects from several industries and sectors, such as construction, oil and gas, transportation, and telecommunication, all underwent this imperfect but useful process.

3. Dismantling federal protection

During a decade in power, the Conservative Government, led by Prime Minister Stephen Harper, formerly an economist and right-wing lobbyist, demonstrated a singular disregard for environmental protection. The 2010 federal speech from the throne portended widespread environmental deregulation and showed that Ottawa would ignore its duty to consult and accommodate Indigenous people regarding anything that might affect treaty or Aboriginal rights.¹³⁶ In 2011, the Harper government withdrew Canada's support for the 1997 Kyoto Protocol.¹³⁷

An omnibus bill of 450 pages and deceptively named the Jobs and Growth Act introduced changes to the Navigable Waters Protection Act so substantial they amounted to a complete overhaul of waterways protection legislation. The renamed Navigation Protection Act (R.S.C., 1985, c. N-22) removed no less than 98% of Canadian waterways from federal protection. The list of newly exempt waterways included, for instance, six rivers in the

¹³⁴ *Ibidem*.

¹³⁵ A.C. Willox, E. Stephenson, J. Allen, F. Bourque, A. Drossos, S. Elgarøy, M. J. Kral et al., "Examining relationships between climate change and mental health in the Circumpolar North." *Regional Environmental Change* 15, no. 1 (2015): 169-182.

¹³⁶ The duty is affirmed in Section Thirty-five of the Constitution Act, 1982 and in various Treaties between the (British) Crown in right of Canada and First Nations and Inuit peoples.

¹³⁷ Canada and Kyoto: A history of the country's involvement and its greenhouse gas emissions, Canadian Broadcasting Corporation, <http://www.cbc.ca/news2/interactives/canada-kyoto/> Accessed Feb. 19, 2016.

Arctic's Queen Maud Gulf in Nunavut, Canada's largest jurisdiction in terms of land mass and the home of most Canadian Inuit. The Queen Maud Gulf hosts a large migratory bird sanctuary that extends from Ellice River in the west to Kaleet River in the east. This area has been the longtime territory of the Ahiakmiut or Kogmiut or the Perry River people,¹³⁸ whose lives are inextricably bound to the local river systems.¹³⁹ Hundreds of thousands of waterfowl breed in this area, including tundra swans, eider ducks, Ross's geese, and many other bird species.¹⁴⁰

The omnibus bill was one of the triggers for Idle No More (INM), a social movement committed to peaceful protest and grounded in Indigenous activism. Its vision was (and is) *to honour Indigenous sovereignty, and to protect the land and water*.¹⁴¹ INM was active in the Arctic with activities such as a flash mob at Iqaluit Airport and an outdoor rally in the town.¹⁴² Many Arctic people were deeply concerned about the federal government's plans to dismantle environmental legislation.

4. Dismantling the dismantling. Conclusions

Inuit, Dene and others live with the often pernicious impacts of climate change in the Arctic. They know that the waterways that surround them are particularly vulnerable to adverse effects yet most of these waterways are now unprotected by Canada's federal government. In the face of climate change, these waterways need more protection, not less. Reversals to the new bill may occur with the 2015 election of a majority Liberal government but there are no solid indications of how or even if this will happen.

The original 1985 legislation should be strengthened, not weakened. As part of this process, legislators should recognize that the Arctic is an at-risk ecosystem that is changing rapidly; thus, its protection should be a priority. The original law assumed a stable ecosystem, characterized by predictability; this meant the emphasis was on preservation. But climate change research has proven that the Arctic ecosystem is far from stable. New legislation must reflect this. Legislative goals need to go beyond preservation to include flexible mechanisms

¹³⁸ Nunavut Tunngavik, NTI IIBA for Conservation Areas: Cultural Heritage and Interpretative Materials Study: Phase I: Cultural Heritage Resources Report and Inventory and Appendices, Iqaluit, NU, May 2011.

¹³⁹ *Ibidem*, p. 13.

¹⁴⁰ Parks Canada, Canada's National Marine Conservation Areas System Plan: Queen Maud Gulf, http://www.pc.gc.ca/progs/amnc-nmca/systemplan/itm1-/arc5_E.asp, Accessed Feb. 19, 2016.

¹⁴¹ Idle No More, "Vision," <http://www.idlenomore.ca/vision>, Accessed Feb. 17, 2016.

¹⁴² W. Bernauer, Idle No More Comes to Nunavut, The Media Co-op, January 26, 2013, <http://www.mediacoop.ca/fr/story/idle-no-more-comes-nunavut/15924>, Accessed Feb. 15, 2016.

to respond to change that is sometimes fast and possibly devastating. The precautionary principle, which has guided activists and legislators for many years, is now insufficient as we seek to protect the geophysical environments on which we depend. Thus, preservation of certain ecosystems or elements of ecosystems may not be possible yet preservation has to be utilized as a first step, always keeping in mind its inadequacy as a response to our current circumstances.

Rather than ignore fragile environments, such as the Queen Maud Gulf, we should adopt a vigilant approach that would have us *monitor and study (these environments) all the time*.¹⁴³ Craig recommends that climate change be incorporated into all levels of planning, from the development of legislation onwards.¹⁴⁴ In the case of Nunavut, Canada's newest jurisdiction,¹⁴⁵ higher levels of scientific and financial resources are required.

Equally important is the recognition of the cultural and emotional significance of the Arctic ecosystem. When this ecosystem is threatened or altered, the mental health of the people for whom it is home are negatively impacted. Accordingly, the mental health impacts of climate change and a changing geophysical environment should motivate legislators. Following this, governments should include in legislation measures to promote the mental health of Arctic people as they cope with the burdens of an unpredictable ecosystem that is increasingly shaped by climate change.

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¹⁴³ R.K. Craig, "Stationary is Dead": Long Live Transformation: Give Principles for Climate Change Adaptation Law, Harvard Environmental Law Review, March, 2010, p. 6.

¹⁴⁴ *Ibidem*, p. 8.

¹⁴⁵ Nunavut was created in 2000 following a land claims settlement with the Inuit of the region.

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